IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 18, 2006

OFFICE OF THE ATTORNEY GENERAL, CONSUMER ADVOCATE AND PROTECTION DIVISION v. TENNESSEE REGULATORY AUTHORITY

Appeal from the Tennessee Regulatory Authority
No. 03-00625 Deborah Taylor Tate, Chairman

No. M2004-01484-COA-R12-CV - Filed on August 13, 2007

This appeal is a continuation of a dispute between the Tennessee Regulatory Authority and the Consumer Advocate and Protection Division of the Office of the Attorney General regarding the procedure used by the Authority to approve certain tariffs filed by BellSouth Telecommunications, Inc. without convening a contested case hearing. While an appeal from the Authority's denial of a contested case hearing with regard to BellSouth's first tariff was pending, BellSouth filed a second, substantially similar tariff. The Authority denied the Division's request to convene a contested case hearing regarding the second tariff based on its earlier refusal to convene a contested case hearing regarding the first tariff. The Division appealed. The Authority suggests that the appeal is moot in light of this court's decision vacating the Authority's approval of the first tariff. We have determined that this appeal should not be dismissed for mootness. We have also determined that the Authority erred by basing its decision to deny the Division's request for a contested case hearing regarding the second tariff on its earlier decision to decline a contested case hearing with regard to the first tariff. Our invalidation of the process the Authority used to approve the first tariff prevents the Authority from using the same process in future cases.

Tenn. R. App. P. 12 Petition for Review; Judgment of the Tennessee Regulatory Authority Vacated and Remanded

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Vance L. Broemel, Senior Counsel; and Joe Shirley, Assistant Attorney General, for the appellants, Consumer Advocate and Protection Division of the Office of the Attorney General.

J. Richard Collier, General Counsel; and Jean A. Stone, Deputy Counsel, for the appellees, Tennessee Regulatory Authority.

R. Dale Grimes, Kristin J. Hazelwood, Guy M. Hicks, and Joelle Phillips, Nashville, Tennessee, for the appellee, BellSouth Telecommunications, Inc.

OPINION

I.

In January 2003, BellSouth Telecommunications, Inc. ("BellSouth") filed a tariff with the Tennessee Regulatory Authority ("Authority") to introduce its "Welcoming Reward Program." The purpose of the program was to encourage certain businesses in urban areas to shift their telephone service to BellSouth. A group of BellSouth's competitors and the Consumer Advocate and Protection Division of the Office of the Attorney General ("CAPD") petitioned the Authority to suspend the "Welcoming Reward Program" and to convene a contested case proceeding regarding the proposed tariff. The parties soon found themselves involved in a protracted series of discussions, conferences, and colloquies which are more fully described in a prior opinion of this court.[1] Eventually, the Authority denied the CAPD's request for a contested case hearing and its accompanying petition to suspend the tariff,[2] and the CAPD appealed the matter to this court. Meanwhile, the Welcoming Reward Program ran its course.

On December 3, 2003, while *Welcoming Reward I* was pending with this court, BellSouth filed a new tariff with the Authority. Essentially, BellSouth sought to re-create its previous Welcoming Reward Program with a new promotion that would run from January 2, 2004 through June 30, 2004.[3] Once again, the CAPD filed a motion to intervene and requested that the Authority convene a contested case hearing. BellSouth responded that, because the new Welcoming Reward tariff was, in almost all respects, the same as the first Welcoming Reward tariff and because the Authority had refused to convene a contested case hearing in that matter, the Authority should similarly decline to convene a contested case hearing regarding the new tariff. The Authority agreed with BellSouth, and on May 6, 2004, issued an order allowing the tariff to go into effect.[4] The CAPD filed an appeal with this court, and BellSouth timely filed a notice of appearance. The second Welcoming Reward Program also ran its course.

On July 9, 2004, this court heard oral argument in *Welcoming Reward I.* On September 4, 2004, upon the joint request of the Authority and the CAPD, we issued an order staying proceedings in the current case until the disposition of *Welcoming Reward I*. We delivered our opinion in *Welcoming Reward I* on November 29, 2005 in which we determined that (1) even though the Welcoming Reward promotion had already ended, the case was not moot because it presented issues

---

[1] *Office of the Att'y Gen. v. Tenn. Regulatory Auth.* (*Welcoming Reward I*), No. M2003-01363-COA-R12-CV, 2005 WL 3193684 (Tenn. Ct. App. Nov. 29, 2005) (No Tenn. R. App. P. 11 application filed).

[2] The Authority was split on the matter. Chairman Sara Kyle and Director Deborah Taylor Tate voted to deny the contested case hearing. Director Ron Jones dissented.

[3] The tariff, as revised, differed from the tariff in *Welcoming Reward I* in three relatively inconsequential respects: (1) the regions to which the tariff applied, (2) the amount of the rebate, and (3) the fact that customers needed to have only one telephone line to be eligible for the promotion.

[4] The composition of the Authority's voting panel was slightly different this time, but the Authority's vote was again split. Chairman Deborah Taylor Tate and Director Pat Miller voted to deny the contested case hearing. Director Ron Jones once again dissented, noting that the issues raised regarding the first Welcoming Reward tariff were still pending before this court.

capable of repetition but which would otherwise evade judicial review,[5] and (2) the Authority had abused its discretion by refusing to convene a contested case hearing in the matter.[6]

On March 13, 2006, the CAPD filed a motion to lift the stay in this matter. BellSouth and the Authority responded by requesting that we enter an order remanding the case to the Authority for proceedings consistent with our opinion in *Welcoming Reward I*. We requested that the CAPD reply to BellSouth's and the Authority's response, and on April 12, 2006, we lifted the stay.

II.

The Authority and BellSouth argue that this case is now moot and should, therefore, be dismissed. The CAPD responds that this case, like *Welcoming Reward I*, fits within an exception to the mootness doctrine. We agree with the CAPD.

At this point, the second Welcoming Reward tariff has expired, and there is no relief that this court can provide to the CAPD with regard to that particular tariff. In *Welcoming Reward I*, we determined that virtually identical facts fit the "capable of repetition yet evading review" exception to the doctrine of mootness. *Welcoming Reward I*, 2005 WL 3193684, at *5-6. Courts invoke this exception only where (1) there is a reasonable expectation that the official act that provoked the litigation will occur again, (2) there is a risk that effective judicial remedies cannot be provided in the event that the official act reoccurs, and (3) the same complaining party will be prejudiced by the official act when it reoccurs. *See Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 1183 (1982); *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely*, 182 S.W.3d 333, 339-340 (Tenn. Ct. App. 2005).

The Authority argues that the facts of this case do not fit within the "capable of repetition yet evading review" exception to the mootness doctrine. It asserts that it now has the benefit of this court's decision in *Welcoming Reward I* and, therefore, that there can be no reasonable expectation that it will engage in similar conduct in the future. Certainly we presume that administrative agencies will act in accordance with the law. *See Estrin v. Moss*, 221 Tenn. 657, 677, 430 S.W.2d 345, 354 (1968); *Seawell v Beeler*, 199 Tenn. 438, 443, 287 S.W.2d 54, 56 (1956). However, the Authority's argument that its decision to deny the CAPD's request for a contested case hearing in this case was appropriate solely because it was consistent with past precedent casts some cloud over the Authority's protestations that it has now abandoned the procedure we invalidated in *Welcoming Reward I*.

In this case, the circumstances in *Welcoming Reward I* have repeated themselves almost exactly, and the three concerns we expressed regarding the initial case remain relevant now. First, the Authority has manifested an intent to follow in the future the procedure that it followed in both *Welcoming Reward I* and this case. Second, the short duration of the tariff at issue and ones like it make it almost impossible for this court to review similar decisions by the Authority until the tariffs

---

[5] *Welcoming Reward I*, 2005 WL 3193684, at *6.

[6] *Welcoming Reward I*, 2005 WL 3193684, at *9-12.

have expired. Third, the Authority's procedure for determining whether or not to convene a contested case hearing could prejudice the interests of the CAPD. *See Welcoming Reward I*, 2005 WL 3193684, at *6. Accordingly, we have determined that this case fits within the exception to the mootness doctrine for issues that are capable of repetition but which will effectively evade judicial review.

III.

The CAPD argues that the Authority's refusal to convene a contested case hearing regarding the second Welcoming Reward tariff constituted an abuse of discretion. The Authority asserts that it properly relied upon its past procedure when it declined to open a contested case hearing.[7] We think the CAPD has the better argument.

The Authority's determination regarding whether to open a contested case hearing in a matter is discretionary. Tenn. Code Ann. § 65-5-103 (2004); Tenn. Comp. R. & Regs. 1220-1-2-.02(4) (2003); *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763-64 (Tenn. 1998). A party aggrieved by the Authority's refusal to convene a contested case hearing must file its appeal directly with this court. Tenn. Code Ann. § 4-5-322(b)(1)(B)(iii) (2005); *Welcoming Reward I*, 2005 WL 3193684, at *8. We review the Authority's decision to decline to stay or to open a contested case proceeding using the criteria set forth in Tenn. Code Ann. § 4-5-322(h) (2005); *Welcoming Reward I*, 2005 WL 3193684, at *8.[8] Therefore, we will reverse the Authority's decision to refuse to open a contested case hearing only if the Authority's action (1) violated constitutional or statutory provisions,[9] (2) was in excess of its statutory authority,[10] (3) utilized unlawful procedure,[11] (4) was arbitrary, capricious, or characterized by an abuse or clearly unwarranted use of discretion,[12] or (5) is unsupported by substantial and material evidence.[13]

The Tennessee General Assembly has given the Authority essentially plenary power over the telecommunications services providers within its jurisdiction. *Consumer Advocate Div. v. Greer*, 967 S.W.2d at 762, and no statute or regulation prescribes specific factors the Authority must consider when deciding whether to dismiss a complaint seeking a contested case proceeding regarding a proposed tariff. *Welcoming Reward I*, 2005 WL 3193684, at *9. While the Authority's enabling statutes are to be liberally construed, Tenn. Code Ann. §§ 65-2-121, 65-4-106 (2004), the

---

[7] BellSouth did not address this issue in its brief before the court.

[8] We have previously described many of these criteria as specific manifestations of conduct that, in other contexts, falls under the general rubric of an "abuse of discretion." *Welcoming Reward I*, 2005 WL 3193684, at *8, n.20.

[9] Tenn. Code Ann. § 4-5-322(h)(1).

[10] Tenn. Code Ann. § 4-5-322(h)(2).

[11] Tenn. Code Ann. § 4-5-322(h)(3).

[12] Tenn. Code Ann. § 4-5-322(h)(4).

[13] Tenn. Code Ann. § 4-5-322(h)(5).

Authority's discretion cannot extend beyond the boundaries established by the statutes and constitutional provisions that govern its actions. *See BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 680 (Tenn. Ct. App. 1997); *Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n*, 844 S.W.2d 151, 161-62 (Tenn. Ct. App. 1992).

The Authority asserts that it is entitled to rely on its decisions in previous cases when it is deciding whether to convene a contested case hearing. Therefore, it argues that its decision not to convene a contested case hearing in this case cannot be an abuse of discretion because it had already determined in an earlier proceeding involving essentially the same issues that convening a contested case proceeding was not warranted. The Authority relies on *Consumer Advocate Division v. Tennessee Regulatory Authority*, No. M1999-01170-COA-R12-CV, 2001 WL 575570 (Tenn. Ct. App. May 30, 2001) (No Tenn. R. App. P. 11 application filed) to support its argument. Its reliance is misplaced.

In *Consumer Advocate Division v. Tennessee Regulatory Authority*, the CAPD and BellSouth were at odds over BellSouth's desire to charge customers for directory assistance in spite of a prior settlement agreement between the parties regarding the charges. The Authority determined that the CAPD had already litigated the same issues in two previous cases that were then pending on appeal and that the settlement agreement at issue before the Authority was not binding on the parties. *Consumer Advocate Div. v. Tenn. Regulatory Auth.*, 2001 WL 575570, at *1-3. After making its findings, the Authority declined to convene a contested case hearing. We affirmed the Authority's decision. *Consumer Advocate Div. v. Tenn. Regulatory Auth.*, 2001 WL 575570, at *6.

Our decision to uphold the Authority's actions in *Consumer Advocate Division v. Tennessee Regulatory Authority* was not premised merely upon the fact that the Authority had previously heard the issues presented in the case. Rather, we determined that the Authority did not abuse its discretion when it declined to convene a contested case hearing after it determined as a matter of law that the breach of contract claim before it failed to state a claim upon which relief could be granted and then determined that it had previously decided the remaining issues in the matter. *Consumer Advocate Div. v. Tenn. Regulatory Auth.*, 2001 WL 575570, at *6. We restated this reasoning in *Welcoming Reward I* when we noted that in the previous two cases in which the courts had reviewed the Authority's denial of a contested case hearing,[14] "the Authority was not required to resolve any disputed factual issues regarding the nature or effect of the challenged tariff, nor was it required to resolve new legal or policy questions. The complaints were subject to dismissal as a matter of law." *Welcoming Reward I*, 2005 WL 31936845, at *9.

Welcoming Reward I, however, presented circumstances quite different from *Consumer Advocate Division v. Tennessee Regulatory Authority.* In the litigation surrounding the first Welcoming Reward tariff, we pointed out several missteps by two of the Authority's directors that resulted in the CAPD being prevented from having a full and fair hearing on its petition. We noted that two of the three directors used their ability to convene a contested case hearing as leverage to induce BellSouth to revise its tariff. The two directors also erroneously treated questions of fact as

[14] The two cases were *Consumer Advocate Division v. Tennessee Regulatory Authority* and *Consumer Advocate Division v. Greer*.

questions of law and, despite a lack of evidence in the record, concluded that BellSouth's tariff did not result in discriminatory prices. The two-director majority also failed to address the CAPD's assertion that certain aspects of the Welcoming Reward tariff were anti-competitive. *Welcoming Reward I*, 2005 WL 3193684, at *10-11. Taking all the circumstances into consideration, we determined that the Authority had abused its discretion by dismissing the petitions to suspend the tariff and by declining to convene a contested case hearing because it acted without proper consideration of the factual issues raised by the intervening complaints. *Welcoming Reward I*, 2005 WL 3193684, at *11.

The Authority's only justification for refusing to convene a contested case hearing in this matter is that it had in the past considered a virtually identical request – the first Welcoming Reward tariff – and rejected it. Our decision in *Welcoming Reward I* pointed out that the Authority's procedure in that matter was riddled with error. Because the Authority's decision in *Welcoming Reward I* was vacated, the reversal of the Authority's order undermines any substantive or procedural reliance that the Authority otherwise might have been entitled to claim with regard to having already heard and decided the issues CAPD is seeking to raise in this proceeding. The Authority received no evidence and conducted no inquiry into the CAPD's claims that the tariff in this matter was discriminatory and anti-competitive. Instead, it adopted its findings in the prior proceedings involving the first Welcoming Reward tariff which were procedurally deficient. While it is true that the Authority did not have the benefit of our decision in *Welcoming Reward I* when it decided this case, the Authority cannot be allowed to transform its past abuse of discretion into binding precedent. We find that the Authority's refusal to convene a contested case hearing constituted an unwarranted use of its discretion.

IV.

As a final matter, the CAPD has asked us to clarify a footnote in our filed opinion in response to the petitions for rehearing in *Welcoming Reward I*, which referred to a new law affecting proceedings before the Authority arising after July 1, 2004.[15] Neither *Welcoming Reward I* nor this matter arose after July 1, 2004. Therefore, we decline to speculate as to the future application of a new law to a tariff that has not yet been filed. We tax the costs of this appeal in equal proportions to the Office of the Attorney General and the Tennessee Regulatory Authority.

WILLIAM C. KOCH, JR., P.J., M.S.

[15] This footnote stated that "[t]his result could conceivably have been different had this proceeding taken place after July 1, 2004 because Tenn. Code Ann. § 65-5-101(c)(3)(C)(i) (2006 Supp.) would have required the complaining party to demonstrate a 'substantial likelihood of prevailing on the merits of its complaint. . . .'" Opinion on Petition for Rehearing, *Office of the Atty. Gen. v. Tenn. Regulatory Auth.*, No. M2003-01363-COA-R12-CV, at n.2 (Tenn. Ct. App. Dec. 21, 2005).